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### Independent Agencies - Independent from Whom?

Section of Administrative Law and Regulatory Practice, American Bar Association

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## INDEPENDENT AGENCIES— INDEPENDENT FROM WHOM?

*Program presented by the  
Section of Administrative Law and  
Regulatory Practice  
American Bar Association*

Washington, D.C.  
October 14, 1988

**S**ALLY KATZEN: Welcome. My name is Sally Katzen. I have the honor of serving as the Chair of the ABA Section of Administrative Law and Regulatory Practice this year. With this program we officially begin the fall meeting of the Section. We're delighted that so many of you were able to attend. At the outset, I would like to extend our deepest thanks to Chief Judge Robinson O. Everett, the Chief Judge of the U.S. Court of Military Appeals who provided these facilities and has been so gracious, as have his colleagues, in welcoming us here.

Our subject this afternoon, is Independent Agencies—Independent from Whom? To begin with basics, you might ask, what is an independent agency? I started, as any sophisticated lawyer would, with a dictionary, and found under the word independent the following definition: Not affiliated with a larger controlling unit. Not subject to another's authority or jurisdiction. Not relying on or requiring the assistance of others. Not influenced by others, in the matters of opinion, conduct, etc. Not looking to others for guidance. Refusing to accept help from or be obliged to others. Desirous of freedom. Do you think that accurately describes your favorite regulatory agency in this town? Does it describe any regulatory agency in this town?

The subject we are considering today—how independent is the independent agency and from whom is it independent—is one that has caught the attention of political scientists, policy makers, academicians,

and lawyers. It is not a new issue. And it is an issue on which reasonable people can, and do, differ.

As I looked through the literature on this subject, I found a statement by the Bronlow Commission in 1937 which said that "independent agencies are, in reality, miniature independent governments set up to deal with the railroad problem, banking problem, or the radio problem. They constitute a headless fourth branch of the government, a haphazard depository of irresponsible agencies and uncoordinated powers." Less than a year later I found another statement that said that independent agencies are "thoroughly subject to control through Congress, the courts, the executive and by the force of public opinion." Are they out of control, are they over-controlled or are they somewhere in between?

In the brochure describing the program, we observed that independent agencies have been a battleground between those who think they are an arm of Congress and those who see them as part of the Executive Branch. The battle is all the more intense when, as in our recent past, Congress and the White House have been controlled by different political parties. Those who watched the debate last night will have their own views toward whether that situation will continue.

Our speakers today were selected because they bring light as well as heat to the debate. They come to this forum with very different perspectives. But one thing they have in common is real life experience with this issue. We are extremely fortunate to have as our keynote speaker Congressman Edward Markey of Massachusetts, Chairman of the Telecommunications and Finance Subcommittee of the House Committee on Energy and Commerce. The Subcommittee has taken a very active role in oversight. On our panel is the Honorable James Miller, Director of the Office of Management and Budget, the Executive Branch's own form of oversight. Next is Commissioner Joseph Grundfest of the Securities and Exchange Commission—an independent agency. And then, Vice-Chairman R. Gaull Silberman of the Equal Employment Opportunity Commission—an almost independent agency. Last, but by no means least, is Professor Peter Strauss of the Columbia University School of Law, who will provide a more objective, or some would say, academic evaluation of the situation. After opening statements by the panelists we'll have any rebuttal comments (you can see I have been influenced by the debates) and then take questions from the floor.

So without further ado, I would like to introduce Congressman Markey, who needs little introduction to those of us in the field of administrative law. He did his undergraduate work at Boston College and received his law degree from Boston College Law School. He has spent his entire professional life in the legislative branch. The year he graduated from law school he was elected to the Massachusetts legislature. And in 1976, he won a 12-way race for the Democratic nomination,

and ultimately was elected to represent the Seventh District in the House of Representatives. He quickly made a mark in Congress, raising a strong voice for consumers on energy issues and speaking against nuclear proliferation, just to mention two of the issues with which he has been involved. From 1981 to 1984 he served as the Chairman of the Oversight and Investigation Subcommittee of the Interior Committee, which has oversight responsibilities for the Nuclear Regulatory Commission. In 1985, he became the Chairman of the House Subcommittee on Energy Conservation and Power and in 1987 he assumed his present position as Chairman of the Telecommunications and Finance Subcommittee. It is a great privilege to welcome Congressman Markey.

CONGRESSMAN MARKEY: Thank you.

What I would like to talk about is how we've gone through a period in which there was pretty much a bipartisan consensus on the need for the independent agencies' existence. Let's just begin with that premise because even that is now in contention. I'd like to begin by noting that in Congress we basically have committees which are drawn along certain functional lines. The Ways and Means Committee taxes everybody. The Appropriations Committee spends all the money. The Energy and Commerce Committee regulates everybody. We're the Regulatory Committee. And so whether it be EPA, NASA, the SEC, CFTC, the FCC, FSLIC, the FTC, just to name a few, almost all regulation, in some manner, shape or form, comes under our jurisdiction, somewhat, to the continuing dismay of the rest of the House of Representatives. Nonetheless, that's the by-product of having Sam Rayburn and Jordan Engel, amongst others, as past Chairmen of your Committee.

So as a result, I have had the personal responsibility for overseeing the Nuclear Regulatory Commission and FERC as a subcommittee chair, and the SEC and the FCC as a subcommittee chair. I've had a pretty good opportunity to look at those agencies up close, and at all the rest which have come before our full committee. I've got a pretty good sense of what's been going on going back to 1976, when I was first elected to Congress. Throughout the 70s, there was a bipartisan consensus on the role of, and need for, the regulations issued by the independent agencies. Regulation was recognized as a vehicle for government to ensure a certain level of safety, security and stability in the economy and the marketplace. Now these are hardly the goals of left-wing, granola-chomping liberals. In fact, I believe that they are essentially conservative values. You should remember that the EPA was created by the Nixon administration. I will concede that by the end of the 70s there was also a growing consensus that there was too much government regulation and that some reassessment was called for—and this helped to put Ronald Reagan in the White House.

But it was Jimmy Carter who did start to take the country down the

deregulatory road with the trucking and airline industries, and it is important to remember that Carter's goal was to promote competition. So when he deregulated, it was to reduce barriers to entry while maintaining consumer protection and antitrust goals. President Reagan's deregulatory goal, on the other hand, went far beyond President Carter's, and was contrary to the bipartisan consensus that had formed as to where regulation was needed. Instead of recognizing that there may have been 10 or even 20 percent too much regulation or red tape, Reagan came in and effectively said that all regulation is bad. It was deregulation without even the trappings of increasing competition. It was the pursuit of deregulation for deregulation's sake. It was a deregulatory feeding frenzy. In fact, it was more than deregulation. It was the denial of any legitimate role for government in ensuring minimum marketplace standards for safety, health and competition.

The independent agencies, as well as cabinet level departments, became arenas where this deregulatory war was waged. It was fought primarily with three weapons: first, the administration appointed people whose goal was to quickly demolish the regulatory structure which had been put in place during the first 200 years of the Republic. Second, the administration set up the OMB and the Vice President's Task Force on Regulatory Relief to put a stranglehold on regulations already in place and to prevent any new regulations from seeing the light of day. Third, the administration simply denied the agencies the money and staff they needed to get their jobs done.

Let me give some examples of how each of these weapons was used. You may not remember James Edwards, a former dentist, who was named President Reagan's first Secretary of Energy. At a hearing in December 1981, Senator John Glenn asked Edwards whether, in being named Secretary of Energy, he had in fact been given the job of doing away with the Department of Energy. "Yes sir, I have," responded the dentist. Glenn asked Edwards when he thought he could accomplish the task. Edwards replied (this is our Secretary of Energy speaking now), "I hope to be back in South Carolina for hunting and fishing in April or May." When told he was overly optimistic, Edwards said cheerily, "the fishing is good in June or July, as well." Edwards never succeeded and Reagan eventually gave up trying to abolish the entire Department of Energy. But as it turned out, the administration's regulatory policy became the equivalent of a "gone fishing" sign hanging on the door of most independent agencies and some departments.

Let me tell you another story which is a good illustration of how the administration used both the power of appointment and the power given to OMB in its attempt to cripple an independent agency. Dr. John Hernandez eventually became Deputy Administrator of the EPA, but was first interviewed for the top job by two men from David Stockman's office at OMB. This is in Ann Gorsuch's own autobiography; I take this from her own writings. Here's how she described Hernandez'

meeting with two people from OMB, deciding on his worthiness for appointment at the EPA:

My meeting was with Glen Schleede, the number three man at OMB, and Fred Khedouri, OMB's budget director for the EPA. I went into that interview very cautiously, because I knew that these people wanted to make major cuts at EPA, so I was quite reluctant to say anything I didn't believe in in the way of philosophy or approach. I was absolutely terrified of becoming the head of EPA and all that mess it was in, so it was in the forefront of my mind all during that meeting that anything I said to those guys I would have to live with when I became the administrator and finally at one point Fred Khedouri leaned over in his chair and quietlike but dead serious asked 'Would you be willing to bring the EPA to its knees?' I was so startled that I kind of just laughed as if I couldn't believe he had said that. But he had said that and I just demurred. And when Ann Burford was selected as head of EPA instead of me, I was very much relieved.

The EPA saga which subsequently unfolded is a good illustration of the cavalier disregard for common sense and the common good displayed by the administration when it came to regulation. And as we saw at the EPA, it could also mean a cavalier disregard for the law—you can just ask Rita Lavelle about that. But even after the EPA fiasco, the administration continued to violate the first law of holes, which is that when you're in one, you should stop digging. In fact, its deregulatory policies could have filled a bottomless pit.

Let me talk for a moment about the Vice President's Task Force on Regulatory Relief. These days, George Bush is running around New Jersey and California claiming to be an environmentalist. Well, if you look at his record as head of the Task Force and believe that, then you'll probably believe him when he goes to Nashville next week and claims that he is Elvis Presley, because there is as much truth in that statement as there is that he was an environmentalist for the last 7¾ years. Bush allowed California oil refineries and other industries to operate despite Clean Air Act bans on new sources of air pollution in poor air quality areas. Bush decided to delay EPA requirements that the timber industry curb pollution; that municipal sewerage systems control industrial pollution; and that dangerous pesticides be regulated. He decided to allow vehicles to emit greater amounts of carbon monoxide and other dangerous pollutants into our air. And he postponed a rule to limit worker's exposure to lead. This is the environmental legacy of the Task Force on Regulatory Relief.

Now let me turn to the administration's third weapon in the war on regulation—cutting staff and funding at independent agencies. Edwin Gray, the former head of the FSLIC, had a run-in with the associate director of OMB just as the deregulatory drive was getting under way in 1981. Gray told OMB about the potential problems that FSLIC faced with savings and loans and banks throughout the country. He told OMB that FSLIC really needed more examiners in the Federal Home Loan Banks. Gray was told by OMB that he obviously didn't

understand the administration's policy of deregulation—that meant reducing, not increasing, the size of the examination staff. He was told that the goal was to get the government out of, not into, the pockets of business. Eventually OMB was generous enough to offer FSLIC thirty-nine new examiners nationwide as their massive deregulatory policies in the Federal Savings and Loan Bank area were being introduced. Unfortunately, as we found out by 1986, FSLIC needed more than 750 new examiners and we know what kind of condition FSLIC is in today. We stand on the verge of one of the most expensive government/taxpayer bailouts in history. And what Gray makes very clear is that yes, there are a lot of crooks and yes, some of this deregulation went too far, but if you are going to do it you better put personnel in place to accommodate a lot of the additional risk which society as a whole runs when you have people engaged in fundamentally dangerous activities that affect other parts of society. The blind pursuit of deregulation overlooked the pressing need for some governmental intervention, as well as the fact that thrift losses might have to be paid by taxpayers down the road.

The parallel experience of the Securities and Exchange Commission to FSLIC is striking. Wall Street was booming throughout the 1980s. Since 1981, the number of registered investment companies and advisers has increased by 86 percent. The number of investors has increased 46 percent and the number of shares traded on the New York Stock Exchange has increased 186 percent. But as you might expect, complaints to the SEC have also increased 55 percent. In 1985 and '86, more than 450 insider trading investigations were referred to the SEC by the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers and the Chicago Board Options Exchange. Yet throughout the 1980s the SEC was consistently given less employees by the administration than in its budget request—hundreds of employees less. The SEC opened investigations into 208 of these insider trading referrals, less than half. The rest were lost in the deregulatory black hole created by the administration's deregulatory policy. If you increase activity in the marketplace as a result of deregulation and reduce the number of personnel who are on duty to monitor it, then in that black hole will flourish the activity which endangers investor confidence in the financial marketplace as a whole. And the lesson taught on October 19, 1987, Black Monday, came as a surprise to many. But I think the handwriting was on the wall long before October 19, and the lesson is the same with FSLIC. Who pays in the long run? Ask the small investor who got wiped out on Black Monday and is afraid to return to the market.

I think the cases that I have spoken about, the EPA, FSLIC, the Vice President's Task Force and the SEC are illustrative of problems caused by the deregulatory drive, but there is no better example in the Reagan era than the Nuclear Regulatory Commission. Let me paraphrase John

F. Kennedy and say this about the Reagan era NRC. It would weaken any regulation, change any rule, befriend any utility and ignore the health and safety of every citizen to keep this nation's nuclear power plants running. This has been the record of the NRC over the past eight years. It is an agency which has been stacked by the Reagan administration with ideological zealots, and, as a result, the NRC has become wedded to the Reagan administration's nuclear policies.

This couldn't be more clear than in the case of the Seabrook Nuclear Power Plant. In a monumental mistake, this plant was sited virtually on top of the beach in Seabrook, New Hampshire. Ninety-four percent of New Hampshire is wooded, but the decision was made to build a nuclear power plant in the middle of the only populated area, on a beach and with just one two-lane road to evacuate upwards of half a million people in the event of an accident. In the event of an accident or meltdown, with crowds on the beach, and only one main thoroughfare out of town, it has proven to be impossible to evacuate the citizens who live within the ten-mile radius of the plant.

Both Massachusetts and New Hampshire have spent hundreds of thousands, if not millions, of dollars, trying to design adequate emergency response plans, but local safety officials have concluded that it would be impossible to evacuate the area during a meltdown. Regulations were adopted after Congress passed legislation requiring emergency evacuation planning—effectively giving state officials a veto over nuclear plant operation if they conclude that they can't adequately provide for the safety of their citizens. The first time a state ever reached that conclusion, the NRC changed its regulations.

The Reagan NRC was so determined to get Seabrook and Shoreham on line it changed the rules on emergency evacuation planning after the states had already invoked their rights under the existing regulations. Even though the NRC is allowed by statute only to use safety as a basis for its decisions, and not economics (that's why we broke the NRC off from the AEC back in 1974–75), the utilities now say that the inexorable pressure of a mistaken investment made twelve years earlier should override any and all safety considerations. Therefore, they maintain, the plant should be licensed and off the books go regulations that had been relied upon by the states over all those years to be used in any administrative or court procedures.

So, even after the accidents at Three Mile Island and Chernobyl, and even with the consensus that followed that public protection is needed, rather than work with communities to ensure public safety, the Reagan NRC has instead tried to shut out public participation and accommodate the nuclear industry. I fought the emergency organization planning question on the floor of the House in August of 1987. My amendment was very simple—don't change health and safety rules to fit a dangerous site. Change the site to fit the rules. It lost after what most people commented was the most heavily lobbied amendment in



the eighties on the floor of Congress. Just imagine every utility executive in America calling his Congressman on this issue. It was the economics of the utility over public safety.

But the Seabrook opening will be litigated and it will go to the Supreme Court. I don't think there is any question about that, because the fundamental question is the ability of federal agencies, independent agencies, to play games with regulations that have been relied upon by states.

A little insight here: The regulations which were on the books in 1975 said that you cannot litigate an emergency evacuation plan until the plant is already built. Massachusetts went in and said we want to litigate now, at the administrative level, because it is foolish to litigate an emergency evacuation plan after the plant is built. Massachusetts was told "no," the plant is going to be built, and under NRC regulations. Your later rights will not be prejudiced and economics will not play a role in any decision when the plant is finally completed. Massachusetts waits twelve years, comes in, and then the NRC takes the regulation off the books, considers the economic cost of the investment, and attempts to ensure the operation of the \$3 to \$5 billion dinosaur which is constructed on the Seabrook beach.

Let me give you one additional example of how far the Reagan administration will go to keep plants running and keep the nuclear utilities happy. In 1986, in a complete abdication of its regulatory responsibilities, the NRC capitulated to industry pressures and withdrew fitness for duty regulations it had first proposed in 1982. These fitness for duty rules would have imposed certain drug and alcohol testing requirements on nuclear utilities for personnel operating nuclear power plants. After all, is it inappropriate to expect that persons operating the most dangerous technology known to mankind be sober and drug-free? An accident could endanger the lives of hundreds of thousands of people.

But even after the NRC's own drug abuse task force described "an alarming increase in reported drug related incidents," and even after its own staff proposed tough mandatory standards, the Commission backed down and substituted an unenforceable policy statement on drug and alcohol use which contained no reporting requirements. Since then we have learned that the problem was much more serious than the NRC Drug Task Force thought.

I have long been concerned with allegations of drug and alcohol abuse during construction of the Seabrook plant. In late November 1986, when I was chair of the Subcommittee on Energy Conservation and Power, I asked the NRC how many drug and alcohol abuse incidents had been reported to it during the construction of the nuclear power plant over the preceding twelve to fourteen years. The NRC reported to me, as Chair of the Subcommittee of Jurisdiction in Congress, that they had been able to identify nine instances of alleged

alcohol and drug abuse at Seabrook during the construction of this plant. I sent three of my staffers to the area surrounding the plant, with instructions to talk to police officials, hospital officials, and to any and all people who might be able to provide information from all records available, as to how many drug and alcohol-related cases came to the attention of the police and others during the time of construction.

We found that there were 561 incidents involving drug and alcohol abuse at Seabrook between 1982 and 1987. Just five years and at the end of construction—not at the beginning of the heavy construction period. Five hundred and eighty-one—yet the NRC only knew of nine at this nuclear power plant. It was so bad that the nuclear industry itself could only find somewhere in the vicinity of 30 drug and alcohol incidents nationwide—in the entire nuclear industry. My staff in two months found 561 at one plant by talking to the local officials and to the officials at the plant, asking for the documents.

I think that the words “benign neglect” charitably describe the NRC’s regulatory posture concerning drug and alcohol abuse at Seabrook and other nuclear power plants. The fact that the Commission’s practices could result in the NRC remaining ignorant of the discovery of \$10,000 worth of cocaine inside the protected area at Seabrook is in itself a sharp indictment of the NRC as a regulatory agency, a regulatory agency constructed to have an exclusive responsibility for the safety of nuclear power plants in our country.

Last month, the Commission finally proposed a fitness-for-duty rule for nuclear power plants. There is drug testing but no alcohol testing. The NRC made the decision to exclude alcohol to keep the utilities happy, despite an incident last year where a plant manager turned up drunk in the control room on New Year’s Eve and began giving orders. What is the bottom line result of this deregulatory approach that the Reagan NRC has adopted? The Reagan NRC has become not a watchdog, but a lapdog for the nuclear utilities. Not a single new nuclear power plant has been ordered since 1978, and no new plants have gone on line since 1974. The remaining plants under construction, like Seabrook, are now running up costs of close to \$3 to 4 billion and the fear is that if they ever go on line they will be unsafe and expensive. Ultimately, those living around the plants will pay for the deregulation with their health, their safety and their hard-earned dollars.

And finally, as the Chairman of that Subcommittee over those years, I can tell you with complete confidence that safety was the lost agenda of an independent agency, which was deliberately constructed because the Atomic Energy Commission had been unable to sort out the difference between being a regulator and a promoter of nuclear energy. So, Congress set up a separate agency just to deal with the issue of safety. And it lost that agenda. The agency once again became captive to those from whom we had sought to set them free.

My responsibilities now with the Federal Communications Commis-

sion bring me to pretty much the same conclusion, which is that right through the Nixon, Ford and Carter years, there was pretty much of a consensus on the need for sound, sensible regulations, and it really didn't make a lot of difference whether it was a Democratic or Republican administration. People tried to work together collectively to produce consensus policy decisions. With the elevation of Mark Fowler to the Chair of the Commission in 1981 and his statement that a television is nothing more than a toaster with pictures, we realized that perhaps he would not have the same view of the role which technology plays in shaping values in this country.

There is a balance between the free market and the unintended consequences of the free market in the effects upon the citizens of our country. When the FCC decided to take the Fairness Doctrine off the books, a law which for forty years had ensured that the public would have access to the airwaves to discuss important public policy issues, we began to realize that, even though Congress had voted 301 to 100 to keep it on the books, there was an ideological bent to the agency which would pursue the deregulation even in the face of a broad-based Democratic and Republican consensus that developed around it. My general sense is, or my hope is, that, if and when George Bush or Michael Dukakis ascend to the presidency, we will see a left-of-center or a right-of-center presidency, but we will not see a right-wing ideological lean, Chicago School of Economics-grounded approach to all issues, regardless of where common sense tells you that the marketplace is not working and that some type of government intervention is necessary in order to protect the common good and the public good. I believe that that era is in the offing, I pray that it is.

I will finish with this one comment. We are about to note the first anniversary of the Crash of 1987. In the wake of that crash, a very curious thing happened. The administration for the first time decided that it would sit down with the Democrats to try to work out in a bipartisan fashion a budget deal, with all issues on the table. Out of that summit last December came a package which was developed largely because we had been sent signals by our world trading partners that they had begun to lose confidence in who we were as a nation: over-leveraged, irresponsible, cavalier and dangerous to the world. We had to send a signal. And that crisis forced the political dynamic to resolve issues on a smart, pragmatic basis.

Simultaneously the administration empaneled the Brady Commission, led by Nicholas Brady and then populated by a long list of traditional conservative Republican economists and thinkers. That report came back in mid-January 1988. It was not the product of liberals, it was the product of conservative Republican traditionalists looking at a problem pragmatically. They said that there was a problem between the CFTC and the SEC and regulation, that stocks and options were regulated by one party and futures by the other, and that somehow or

other, there had been no real way of reconciling the problems that developed as the products transformed themselves into futures and then back into equity again. They said that there was a problem with margins on stocks and options set by the Fed but with futures set by the Merc, a private agency. They said that maybe we should have the Fed, or some other agency, have sole responsibility for coordinating these policies in a unified financial marketplace.

Nicholas Brady said to us as he introduced his report that there was "a gun pointed at the economy of the United States and that gun is still loaded." Well, no fundamental changes have been made since that time. And in his confirmation testimony before the Senate last month, Nick Brady said "Don't worry, be happy. There are no more problems. I think that everything is okay." I have great hopes that if, in fact, we do go into a Bush era, that the Nicholas Bradys, the Jim Bakers and others might be more pragmatic, might look at these issues in a way in which the budget compromise of December 1987 and the Brady Report of 1988 dealt with those issues. There is no liberal/conservative way of looking at it as far as I am concerned. I can't figure out what a liberal perspective is on ensuring that people can get away from a meltdown at a new nuclear power plant, or from a stock market that drops 508 points in an afternoon.

In conclusion, let me summarize by saying the following: I think what happened in our regulatory structure over the last seven and a half years was an imposition of ideological right-wing philosophy that ran fundamentally contrary to the tradition of our independent agencies—which have been, up until the beginning of this decade, basically problem-solvers. I thank you for this opportunity to be here with you. Thank you.

SALLY KATZEN: Our next speaker is James C. Miller, Director of the Office of Management and Budget. He did his undergraduate work in Economics at the University of Georgia and received his Ph.D. in that field at the University of Virginia. He served as the senior staff economist at the Department of Transportation from 1969–1972. In 1974, he was appointed senior staff economist for the President's Council of Economic Advisors, and in 1975, he was appointed Assistant Director for Regulatory Review of the organization known as the Council on Wage and Price Stability, an organization that I was briefly associated with. After a period with the American Enterprise Institute, as resident scholar and co-director for the Center for the Study of Government Regulation, he was named as OMB's first Administrator for Information and Regulatory Affairs, a position he held for eight months in 1981, when he became Chairman of the Federal Trade Commission. He has served as the Director of OMB since October 1985 and will do so through tomorrow.

I would like to add a personal note of thanks to him for finding time to honor his commitment to us on this, his last full day in office, and

my own regret that he is leaving government. We are very honored to have him with us today and I would like now to turn the mike over to Jim Miller.

JAMES MILLER: Thank you Sally. I leave government tomorrow with enormous respect for the people I work with, with even greater appreciation for the role of public service, and with great optimism for the future. I appreciate this chance to be with you today.

Let me begin by saying that independent agencies should not be independent.\* I believe that for policy as well as for constitutional reasons.

When I was Chairman of the FTC, I often asked myself the following question: "To whom am I accountable?" Often, it seemed, the answer would be: "To 435 Congressmen, 100 Senators, and the President himself!" On many occasions, however, the answer would be: "As long as I apply a modicum of discretion, I am accountable to *no one*." This answer, I submit, is evidence of a major institutional defect, for it means that at least one official, with rather broad latitude for public good or public harm, occasionally did not feel accountable. Such a situation would be far less likely if the official in question had been more closely supervised by the President and his assigns.

In addition to insufficient accountability, there are other policy reasons why I believe the independence of independent agencies is a bad idea. Consider the problem of policy coordination. In the area of antitrust, for example, there is a compelling need for the FTC to coordinate its policies with those of the Antitrust Division of the Department of Justice. While a considerable amount of such coordination does go on, the Commission has been reluctant to get involved in certain pertinent, though higher-level, executive branch policy activities. (I remember well the objections raised by Senator Arlen Specter to the FTC's representation on a White House working group coordinating commercial policy.)

A related shortcoming of "independence" is that independent agencies have "no place at the table" when it comes to formulating policies that directly affect the agency. It is difficult enough for non-cabinet executive agencies to feel fully informed and to be represented at the highest levels of government decisionmaking. But the independent agencies have *little voice* in such deliberations nor the efficient means to gather information from such proceedings.

Let me hasten to point out that thus far I've been reflecting upon the *executive* functions of independent agencies. Of course, when agencies—*independent or otherwise*—engage in *adjudicatory* functions, I believe that strict independence must be maintained.

As for the constitutional reasons why independence is a bad idea, I

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\*The material that follows was subsequently printed in 1988 DUKE L.J. 297.

shall leave it to those trained in the law to elucidate. Suffice it to say, however, that *INS v. Chadha* and its progeny would appear to shake the foundation of the house of cards built upon *Humphrey's Executor v. United States*.

A few additional observations. First, in my experience, "outside contacts" from government officials that were (or bordered upon being) improper were almost always generated at the Capitol Hill end of Pennsylvania Avenue rather than at the White House end. In the vast majority of cases, it was merely an instance of a Congressman or Senator responding to some constituent's plea and not realizing the sensitivity of the contact (with my office). Thus, I developed a quick and ready response whenever such a call was received. It went like this: "Congressman (or Senator), before you get into that, I'm sure you must be calling me about the *merits* of the issue, not the politics. And since you are calling me about the merits, I think it vitally important that you place all such materials in the public record. Let me assure you that we will give due consideration to any and all views that may be pertinent to this case. Of course, we will have to make our judgment on the merits in each instance." Not inconsistent with this policy, I would always, "as a favor," agree to visit with anyone a Congressman or Senator insisted that I meet. I would also hear their pitch. But I refused to give any "special consideration" to their "connections" and courteously communicated the same to any congressional caller.

Beyond a number of "outside contacts" with regard to specific matters, I encountered a plethora of congressional (and a few executive) pressures—some of which were constructive in that they reinforced the notion of accountability, but most were not. The *head* of an independent agency must be especially vigilant to protect the prerogatives of the agency against vested interests. Being outside the shelter and protection afforded by the President, independent agency officials are more open to "hits" by members of Congress and the media. With a far greater frequency than that experienced by executive officials, appointees to independent agencies are fair game for congressional theatrics and their supporters in the media. While that is to be expected ("it goes with the job"), it means that independent agencies must be specially resilient and careful in order to maintain the morale and credibility necessary for efficient functioning. (Of course, one way of ameliorating this problem is to eliminate the distinction between executive and independent agencies.)

In conclusion, I believe it would be wise to eliminate completely the distinction afforded independent agencies. The executive as well as adjudicatory functions of independent agencies can be accomplished perfectly well by executive officials serving at the pleasure of the President.

QUESTION: Jim, I've never understood why, as head of OMB, you've never called an agency head not in the adjudicatory context, but in

the rulemaking context. Why the Reagan administration, with its enthusiasm for various forms of impact statements, never said to the independent agencies, this makes sense for you too, it really does. Is that simply a political judgment?

JAMES MILLER: Well, Vice President Bush made a cut on that early on—we would not apply Executive Order 12291 to the independent agencies.

QUESTION: You could.

JAMES MILLER: We could; the Justice Department concluded we could. But the Vice President concluded this would be unwise. Instead, he sent a letter asking the independent agencies to make their rulemakings in accord with the requirements of the executive order. Most said they'd take the issue under advisement or something like that, but none chose not to comply with the requirements of the executive order. And none to my knowledge, including the FTC even when it had a Reagan majority, took the initiative to comply with the order. Probably I should have tried such a thing; it would have been very controversial, I'm sure.

QUESTION: Just because of congressional politics?

JAMES MILLER: Oh, yes. You know the old story about the chicken? It breaks out of its shell and calls as mother whoever happens to be closest around. Independent agencies tend to hear from Congress and think of Congress as their mother; they don't hear much from the executive branch of government—not from the President or his immediate assigns. So if there's asymmetry here—and I believe there is—it's skewed toward domination of independent agencies by Congress, not by the executive branch.

R. GAULL SILBERMAN: And even those of us who have complied with that executive order, and who regularly send over our compilations of what policymaking we're going to do, rarely hear about it, and basically we tend not to put on those lists things that are controversial, because if you do, then you're going to get problems. I'm not sure how effective it all is.

JAMES MILLER: I hope I didn't misspeak. Since I've been Director of OMB, I have called the head of an executive branch agency about some rulemaking they were engaged in, but no independent agency people, and certainly nothing having to do with adjudication.

QUESTION: I'm puzzled about this particular issue that Peter asked you about. Are you suggesting that political communications about prospective rules are undesirable? You know there is a journal which you are personally very well familiar with, *Regulation*, and you're also very well familiar with the former Chair of this Section, Nino Scalia, who wrote a marvelous article lambasting a case called *Home Box Office*, and I'm kind of puzzled as to whether you're saying, you kind of indicated that one of the arguments that there ought not to be a distinction between independent agencies and executive agencies was

because there wasn't much political communication, you said with respect to the independent agencies and I guess I'm asking do you think there ought to be? Nino makes a very convincing case that *Home Box Office* of course was wrong and there could be ex parte communications, particularly about political matters as a means of securing accountability of agencies. Putting aside whatever the law may be at the moment, I'm curious as to what you think.

JAMES MILLER: You mean, what I would recommend.

QUESTION: Yes.

JAMES MILLER: Not what I would do.

QUESTION: No, what you recommend.

JAMES MILLER: I think the President or his assigns should feel free to communicate with independent agencies, but I draw a line between rulemaking and adjudication. For example, the President of the United States says, "You have before you, Federal Trade Commission, the prospect of suing in court to enjoin a merger between companies A and B; you should do that." In my judgment, we should do that. On the other hand, if we had voted out a complaint on the matter and the President called up to say we should find them guilty or should let them off the hook, I'd say: "Mr. President, it is improper for you to be contacting me about this matter, and furthermore I'm going to put a memorandum of your call and my response to you on the record."

QUESTION: I'm talking strictly about rulemaking.

JAMES MILLER: Specifically with respect to rulemaking and even less formal policymaking, I think the President and/or his assigns should have complete authority to direct the independent agencies. For example, if the President called up and said to the FTC, you've got this deception standard before you and I think you should tailor it in such and such a way, I would feel obligated to carry out his wishes. Of course, let me add that such a scenario is extremely unlikely.

SALLY KATZEN: I think we should continue with the other panelists, if we can.

Having heard from Capitol Hill and the executive branch, we turn now to the representatives from the agencies. Our next speaker is both a lawyer and an economist. He did his undergraduate work in economics at Yale, and then earned an M.B.S. in mathematical economics and econometrics at the London School of Economics. He received his J.D. from Stanford Law School, and was in private practice at Wilmer, Cutler & Pickering here in Washington (another organization that I have been associated with). He left to assume the position of Counsel and Senior Economist for Legal and Regulatory Matters on the President's Council of Economic Advisors. In October of 1985 he became Commissioner of the Securities and Exchange Commission. We welcome Commissioner Joseph Grundfest.

JOSEPH GRUNDFEST: Thank you Sally. I'm going to try to follow a very logical progression. As you noticed, Congressman Markey was



standing up at the podium; Jim Miller, who after all is only from the administration, was standing here at the table; and since I'm from an independent agency, I'm going to relax along with the rest of you and I will continue to sit.

The topic of what I would like to discuss will follow along with the topic of this meeting—Independent Agencies: Independent From Whom?—and what I would like to discuss is reality versus the theory of that topic. I will use my experience over the last year at the Securities and Exchange Commission as a case study of reality versus theory on the issue of independence.

First, what I would like to do is balance the extent of contacts I myself have experienced from Capitol Hill and from the administration. Second, I would like to explore some material that might be familiar to everyone in this room—that would be the legal standards governing some of those contacts, aside from the usual Administrative Procedure Act considerations. Third, I would like to share with you that the major issue of independence may well not have anything to do with the commissions' or commissioners' independence from either end of Pennsylvania Avenue, but as a practical matter—and remember we are talking reality versus theory—the practical question of independence may well be, can a commission be independent of its own staff? Fourth, Congressman Markey raised the issue of funding for the SEC, and I am sorry he is not here as I would like to raise some points in response to a couple of things he said, and it is impossible to be from the SEC and speak in public without mentioning the Crash of '87. So again, I would like to pick up on a couple of observations that might be left in the wake of Congressman Markey's remarks.

First, the issue of reality versus theory, and the extent of influence from the administration as opposed to the extent of influence from Capitol Hill. I think it's fair to say that influences from Capitol Hill are far more persistent and insistent than any influences from the administration. It is possible to explain that I think with the broad oversight responsibility that Congress sees for itself, but if one sits back and does a bit of an inventory, as I have over the last couple of days, and compares the extent of the influence, it really is quite remarkable. I have searched my files, alright, and maybe I have missed something; but, after a diligent search conducted by my confidential assistants, interviews with my legal counsel, a review of records and to the best of my recollection, I hold here in my right hand the sum total of all written communications that I have received from the administration, and that is from OMB and from the Council of Economic Advisors over the last twelve months. I have got a letter from Beryl Sprinkle involving an issue of arbitration, and then I have two letters very similar—one from CEA, one from OMB—having to do with matters involving rule 19(c)(4)—one share, one vote. All of these are available

in the public file; all of them were, as a practical matter, immediately made public upon their arrival at the Commission.

With regard to the question of independence, how did these two letters influence me? I can tell you that on the one share, one vote matter, I disagreed with the position that the administration took; ironically, I disagreed with the position because I believe that markets work better than elections and the administration's position, I think, would rely too much on electoral mechanisms in the corporate sphere, and I thought we had fashioned a rule that was actually more market-oriented than the position the administration was relying on. Therefore, I disagree with Beryl and with the Office of Management and Budget. With regard to the second issue, mandatory arbitration in 34 act cases, the position that I have taken is that we do not yet have enough information to reach an intelligent conclusion about what position to take on that issue, so I have not come down either on Congressman Markey's side yet, or on the side of the administration. We are in the process of gathering some of that information, and we are going to fish or cut bait at some time in the near future.

So with regard to influence from these letters, the administration was nothing for one on the one issue where it has been decided. In contrast to the information that I have received in the written materials from the administration, this is my file of congressional materials; these are the materials from Congress and some of our responses to Congress, and I have a much greater degree of certainty that this is not a complete stack of materials whereas this [administration file] is a complete stack. When you get something from the administration, it is such a rare event that you check the name on the envelope to make sure it wasn't sent to you by mistake as a practical matter. If you were to look through the topics discussed in these materials, it really would be quite remarkable. It covers virtually anything and everything that comes before the SEC from the most important and significant to almost the most trivial and benign. The most interesting letter in this whole stack comes from Edward J. Markey and I am sorry that Congressman Markey is not here. In order to understand the background of this letter, I would like to read the last paragraph of the letter regarding arbitration that Beryl Sprinkle sent to the SEC.

Beryl wrote:

The Council—meaning the Council of Economic Advisors—cannot help but be concerned by the series of interventions in the Securities Markets which have been proposed and considered in the last year. Many of these proposals would have the effect of increasing the regulation of the securities markets in a manner that is fundamentally inconsistent with the policy of this administration. While this proposal focuses on a narrow area, it is representative of the type of interference with freedom of contract and market processes which the president, time and again, has opposed in the strongest terms. We will not hesitate to express our opposition to this

legislation and any other legislation of a similar tenor.

Alright, that is a letter to the SEC that was publicly available and it came from Beryl Sprinkle. Part of the response, and I am not leaving out any of the good stuff, I can guarantee you, from Ed Markey reads as follows: "I note at the outset that the SEC [and this is a letter to Chairman Sprinkle from Ed Markey] has a distinguished history as a fiercely independent agency, and that this independence is both necessary and appropriate. I am informed by the agency that it is not its practice to solicit the views of the White House on matters the SEC has under consideration—which might result in legislative action—nor is it customary for the CEA on its own initiative to proffer its opinion on such matters. Aside from the merits of outlawing mandatory arbitration clauses, which I believe to constitute contracts of adhesion, your letter implies that the SEC should not pursue interventions in the market because such a course is inconsistent with the ideology of the incumbent administration. This is a disturbing interpretation of, and intrusion into, the Commission's independent status. As you are aware, the SEC was created by Congress in partial response to the laissez-faire attitudes that prevailed up to, and throughout, the Roaring Twenties. The unfounded fear of regulation that shaped policy during those years contributed to the collapse of the stock market and of the American economy. Administrations come and go and regulatory philosophies change, and since its inception, the SEC has been charged by the Congress with the mandate of investor protection. The administration should recognize that it is not inconsistent with the Commission's history or purpose that it should prescribe limitations on the relationships which its regulated broker dealers can impose upon their customers. The CEA might prefer to see regulation directed by the invisible hand of the market, but that is not what our securities laws contemplate. I call the SEC's initiatives in 1988, many of which strike me as hopeful for the cause of investor protection. This is a principle inherently intent of Congress and creating the SEC and remains central to that agency's ongoing mission."

I would submit to you that a large part of Congressman Markey's concern is not over the extent of the participation or the views expressed by the Council of Economic Advisors, but the fact that those were not his views and that there was a disagreement between Congressman Markey and the administration on this issue and that had the administration supported Congressman Markey's views, we would have received a letter saying as you observe you have received letters from CEA supporting our position and when you have got Congress and you have got the administration all pointing in one direction, why aren't you, SEC, independent agency, marching along with us. I think as a practical matter much of the debate that one often hears in this area is, quite candidly, goal-oriented. If independent means that you

are going to disagree with us, oh no, you are not independent. You don't understand, you are a creature of Congress. You have to do what we are doing, don't you read the votes, don't you know we just had a vote 300 to 100, how could you possibly be independent of that. On the other hand, if you are doing what we think is right for you to do, then in that case, you are exercising your best independent judgment. It is not a surprising situation—Washington is a political town. One learns to live in that kind of an environment relatively quickly, if not comfortably or easily. I should also say that written contacts are not the only ones that one gets in this town. We have telephones, and people have our telephone numbers. My personal experience is that if I were to estimate a ratio of Hill contacts to administration contacts, I would say that I would probably get 30 Hill contacts for every contact with anyone related to the administration where any SEC business is discussed at all. I can tell you that in every single one of those calls, what a person is generally asked for has usually been from the staff level. They have asked for publicly available information—where can I get a copy of your 19(c)(4) release, where can I get some of the background—really, it is the kind of situation where, because of personal acquaintances, I wind up playing the role of a law librarian for some people in the administration. That is the extent of all phone conversations that I have received along those lines.

In terms of where can an administration or Congress go wrong, if one looks at case law, one generally finds that problems of undue influence arise as a result of excessive intervention of Congress, not by the administration. *Pillsbury v. FTC*, which is a case probably familiar to most of you in this room, looks to the importance of noninterference with mental decisional processes of members of the agency. *Standard Oil v. FTC* is a fascinating case having to do with influence and the decision to bring the case in that situation. The FTC commenced an informal investigation of Standard Oil but took no investigatory steps for seventeen months. Senator Jackson of the Committee on Government Operations asked the FTC for an explanation of the relationship between certain practices of the petroleum industry and then-current oil shortages. One day after that request was received, the FTC issued subpoenas to three Standard Oil officers, and shortly thereafter, sent Senator Jackson a report on its investigation of the petroleum industry. When Senator Jackson released the report, the FTC commenced this action against Standard Oil. In that case, the Ninth Circuit found that there was reason to believe that the agency did not have a sufficient basis in filing its civil complaint, and there may have been overinfluence from Capitol Hill. The D.C. Circuit in 1971, in *D.C. Federation of Civic Associations v. Volpe*, looked at the possibility of threats from Capitol Hill intruding into what it called the “calculus of consideration” at the independent agency. There, the Secretary of Transportation's order came shortly after a member of the House Appropriations

Committee threatened that if bridge construction were not ordered promptly, the Congressman would recommend the withholding of funds necessary for the completion of the much-needed city subway system. There the court held that the action by the member of Congress intruded into the "calculus of consideration" on which the Secretary's decision was based.

My third observation is that if one looks at independence and one looks at the battle between Capitol Hill and the administration, one might be overlooking an important problem that often lies underneath an independent commissioner's nose, and that is the question of independence from staff. Staff, in our case, I think is extraordinarily talented but is also very strong-willed. The experience that I have generally had is that staff will be very solicitous of Capitol Hill, and will be sure that when there is a rulemaking proposal or anything of that sort, everything that Capitol Hill might be sensitive about is dealt with in the proposing release or in the adopting release, and that all those i's are dotted, all the t's are crossed and the appropriate Hill staffers have been contacted about what is likely to happen given their level of interest in the matter—particularly when we have an upcoming adopting release. On the other hand, to the best of my knowledge, there is not contact between the staff and anybody in the administration to find out whether the administration may have any concerns in this area. There is no effort that I have ever seen to try to put information into a release in order to address any concerns that the staff might believe in its own mind that the administration might have, while, by the same token, there is generally far more effort that I see invested in trying to respond to possible concerns that may exist on Capitol Hill, the other end of Pennsylvania Avenue.

With regard to the funding issue, I think it is obvious that unless you have reached the point that economists call net negative marginal returns, if you give us more money, yes, we can do more; that is a point not worth debating. However, it is also obvious that resources in our government are not infinite, they are finite. And when we come to the question of whether the SEC should have more money, we also in the same breath have to answer the question, from where? If we give more money to the SEC, from where do we take it? Does that mean that we spend less money on AIDS research; does that mean that we spend less money on housing for the homeless; does it mean that we spend less money on defense; or does it mean that we decide to live with the bigger deficit? You give me another dollar to spend at the SEC, I can do a pretty good job with it and I know what we can do with it. And in many ways, I think it can be a very sensible thing. But I have got to compete with other demands in our system. But I have a hard time telling you that giving me another dollar is more sensible at this point than spending another dollar on housing for the homeless or for AIDS

research. That is a tougher question, and I have to leave it to other branches of the government to resolve that problem.

Finally, when it comes to the question of the crash, let me tell you that there is bad news and there is good news. As I see it, the bad news is that since the October 19 crash, the federal government has done relatively little. The good news is that since the October 19 crash, the federal government has done relatively little. If one looks at the experience of 1929, one will observe that the period following the crash from a microeconomic perspective—which is, after all, the most important perspective—things did not appear and the government reaction in the wake of the crash created a problem far more serious than the crash itself. To date—and who knows what will happen in the next Congress, and who knows what'll happen in the next administration—we have avoided repeating those mistakes of 1929. The experience of October 19 certainly pointed out many shortcomings in the operation of the nation's capital markets, and there are many things that can and should be done. I'm afraid, however, that Congressman Markey and I might not agree on many of those points, and looking particularly at the question of jurisdiction, I don't think the location of lines on an organization chart had anything to do with the market going down 508 points on one Monday in October. Even if one thinks that taking jurisdiction over index futures away from the CFTC and the SEC is the answer to the problem, I would observe that one generally does not want to fight a land war in Asia. And if you have ever seen a battle of jurisdiction among congressional committees, you would prefer to fight a land war in Asia than get involved in the midst of that kind of dispute. I would look to send to Congressman Markey and I could understand why he would want the SEC to have jurisdiction that would increase the jurisdiction of his oversight committee; but, for him to get that jurisdiction, he's going to have to arm-wrestle with the House Agriculture Committee, and the Senate Banking Committee is going to have to arm-wrestle with the Senate Agriculture Committee. I can tell you, given the amount of energy and time and political acrimony that would be involved in that kind of dispute, I can take all of those resources, and I think if applied in a cooperative fashion, we can do more for America's capital markets than spending all that time, effort and energy involved in the political equivalent of guerilla warfare up on Capitol Hill. Thank you.

SALLY KATZEN: Thank you very much.

Next we welcome a graduate of Smith College (and by now it should come as no surprise to you that it is another organization with which I had been associated ). Ms. Silberman began her service in government in 1974 when President Nixon appointed her to the National Advisory Council on the Education of Disadvantaged Children. After serving as the head of the Board of the Widening Horizons, which works closely with the D.C. Board of Education on Career Planning

for Inner City Students, Ms. Silberman spent two years in Yugoslavia accompanying her husband, the U.S. ambassador. Upon her return, she served as a consultant to the Republican National Senatorial Committee and, in 1978, she began her stint on Capitol Hill working with Senator Packwood of Oregon.

In 1983, she began her tenure with regulatory agencies, serving first as a special assistant to an FCC commissioner. In 1985, she was sworn in as a Commissioner at the EEOC, and I already apologized that her name tag is wrong, as she was designated Vice Chairman of the EEOC in 1986. We look forward to hearing the views of Vice-Chairman Silberman.

R. GAULL SILBERMAN: Thank you. I am really delighted to be here to explore the question Independent Agencies—Independent Of (or From) Whom: I'm not sure, Sally, which it is—it switched in the middle.

Now generally, this question is asked in terms of the separation of powers. Are these entities independent of the executive branch? Are they independent of the legislative branch? Or, as some have said, do they constitute a fourth (I think the word is) headless branch of government, independent of both? I would like to draw on my four years of experience at the EEOC and suggest that we not focus on the abstract question of independence, but on what or who influences agencies, and when and whether those influences affect the way agencies function within the statutory parameters that the Congress sets for them. Or, if I may immediately establish my bona fides as a nonlawyer in this group, and put it this way in plain English: Who's putting it to whom, and really does it matter?

Now the EEOC is not a paradigm of an executive, an independent or even a quasi-independent agency, although today we have all the classic characteristics of an independent regulatory agency. We're a multi-member, politically appointed panel with fixed terms; we have no more than a majority of one party; and, we operate under a very specialized mandate. We have a measure of discretionary authority over matters such as budget, relations with Congress and positions taken in litigation. We have the power to conduct on-the-record adjudicative hearings, investigations and bring enforcement actions in court; we have broad rulemaking authority (which is what I'm going to focus on); and there are restrictions on the President's power to remove us. But this has not always been the case.

Congress established the EEOC in the Civil Rights Act of 1964 as an executive branch agency, albeit multi-member and politically appointed. But the EEOC's authority was severely limited. In effect, we were a claims adjustment agency operating in the emotionally charged era of newly defined civil rights. By 1972, Congress realized the agency's authority was woefully inadequate to carry out its statutory mandate and gave the EEOC prosecutorial power. Congress was unwilling

then, and continues to be unwilling, to give us cease and desist power. Later, in a presidential reorganization in 1979, authorized by an act of Congress, enforcement authority, and with it, the substantive rule-making authority for the Age Discrimination and Employment Act, was transferred from the Department of Labor to the EEOC. That same reorganization also gave us broad quasi-judicial authority for federal sector equal employment opportunity.

This transfer of authority from the executive department should have clarified the agency status; yet, confusion remained, and I was reminded in listening to Congressman Markey about a discussion to which I was privy. Chairman Thomas—the Chairman of our Commission—was testifying in front of the House Subcommittee and Oversight Committee, and he was castigated by the Chairman of that Committee about the EEOC's "kowtowing" to OMB and "kowtowing" to the Department of Justice, and the Chairman banged his hand on the table and said, "Why aren't you exercising more independence?" Chairman Thomas explained to the Chairman of the Subcommittee that we were, after all, an executive branch agency and the Congressman railed that the Congressional Research Service would certainly prove the Chairman wrong and that he was going to make sure that they did. Now this Congressman, to his credit, six months later on publication of the CRS opinion, publicly admitted his error. But I think the story speaks volumes about influence, and that brings me back to the subject of influence.

Obviously, whether independent, executive or somewhere in between, all agencies are influenced by Congress and by the President, influence which is by constitutional design. Congress writes the laws that establish agencies, sets the statutory parameters for our actions, and the President executes those laws. The President sets budget priorities and the Congress votes the money—and those are realities of which no agency is independent. But in the modern administrative state, the executive and the Congress are not the only players. I was interested that Joe Grundfest was talking about the staff. I would like to bring up another player, and that is the interest groups. The interest groups exert power and greatly influence how an agency such as the EEOC functions.

Now, Congress has given the EEOC prosecutorial, adjudicatory and legislative functions. It's been my experience—and this has been echoed again and again today—that rarely, if ever, is significant influence brought to bear when we prosecute or when we adjudicate. The Congress, the executive, even the interest groups, seem unwilling to try to affect individual case outcome. The struggle is over policymaking, and the policy made on a case-by-case basis is too incremental to draw their attention. They'd rather leave it to the courts.

That is not so with respect to rulemaking. Here influence, particularly that of the interest groups, has seriously challenged the EEOC's



authority, expertise, and even its ability, to function within congressionally dictated statutory parameters. Now Congress has delegated much legislative authority to the experts, to the agencies; in part, because of their expertise, but in part because it is politically expedient. Here I'd like to quote John Hart Ely: "How much more comfortable it must be to simply vote in favor of a bill calling for safe cars, clean air, or nondiscrimination, and to leave to others the chore of fleshing out what such a mandate might mean. How much safer, too, and here we get to the nub," says Ely, "for the fact seems to be that on most hard issues, our representatives quite shrewdly prefer not to stand up and be counted, but rather to let some executive branch bureaucrat, or perhaps some independent regulatory commission, take the inevitable political heat." Congress may delegate some of its legislative authority, but that delegation is conditioned on the agency's not overstepping some undefined Maginot Line. Before *Chadha*, the legislative veto was Congress' ultimate influence on regulatory outcomes. Post-*Chadha*, the Congress retains a de facto veto often exercised, in our case, after an interest group has drawn a *post facto* line. A footnote on my experience: Even in policymaking, a weakened executive exerts its influence in less direct, and, I have to tell you frankly, much less effective ways.

I'd like to illustrate with a recent EEOC war story. A Sixth Circuit ruling, which was later reversed *en banc*, would have required the EEOC to supervise all private settlements between employees and employers in which ADEA rights were involved. The administrative, as well as philosophical, implications of this were awesome. Here was an appropriate point to put our seldom-used rulemaking authority to work. The rulemaking process results in credible, consistent and predictable policy. It's more open, more democratic, and therefore more desirable. So why not use it? Why indeed. We issued a Notice of Proposed Rulemaking (NPRM) asking for on-the-record comment. Our experts were instructed by these comments and we promulgated a final rule that voluntary and knowing settlements under the ADEA—which, by the way, is just like Title VII—were legal as long as certain standards were met. But, as it turned out, there was nothing final about that rulemaking because the AARP, the American Association of Retired Persons, didn't like the rulemaking.

Now, in our judgment, the final rule preserved certain important options for older workers while providing safeguards against intimidation and other forms of undue pressure. The AARP worried about the impact of early retirement on the Social Security system and questioned the ability of older workers to make the decision to retire early or not, in return for a cash benefit, unless aided by the government. They took their disagreement to Congress and when the AARP talks, Congress listens.

Let me tell you about post-final rule influence: an unprecedented,

year-long congressional investigation into EEOC enforcement and policymaking under the ADEA. You had to fight your way into our office, for investigators from the Aging Committee were there all year poring over the files. We actually had to close for a whole week in order to respond to their requests. Multiple oversight hearings followed, and I mean multiple.

The President's 1988 budget request for the agency was cut by \$14 million and I wish Congressman Markey were here so that I could take exception to his discussion of the congressional funding of important programs and how this administration has cut that funding. Every year that President Reagan has been in office, he has requested more money for the EEOC, the premier civil rights enforcement organization in the government, than the Congress—the Democratic Congress—has authorized. So this year we got a \$14 million cut (that's 10 percent of our budget in a labor-intensive agency), and, in a final coup-de-grace, in a midnight appropriation session, Senator Metzenbaum threatened to cut off the salaries of the commissioners if we enforced the rule-making. That was very influential, very influential. Ultimately, Congress ordered us not to spend any money to give effect to the rule during fiscal 1988. The AARP has kept up the pressure with efforts in the last few months to introduce substantive legislation which would nullify the rule. If those efforts fail, the suspension will continue.

So, in the final analysis, the conditions for delegation of legislative authority were not met. And I might note in response to something that Jim Miller said about the protection that the executive branch gives executive branch agencies, when the Congress pulled the plug on this executive branch agency's rule no executive was there to protect us. The rule went down the drain. Now, obviously, an experience like this is a powerful disincentive to rulemaking. Our staff was disheartened: two years of their work had gone into the rule. During our congressional trials, the staff burned the midnight oil and watched as precious resources were spent responding to unreasonable congressional oversight—resources they knew should have been spent, and needed to be spent, prosecuting cases. Their professionalism was challenged by repeated assaults on the commission's integrity. Our bureaucracy was not captured. It was wounded, it was punished. And I think that may be because our bureaucrats have a stake in the agency's success and well-being, and I have to tell you that's a stake that I don't think is unique to the EEOC. But such pressure takes its toll on political appointees as well. This was vividly illustrated in a rulemaking sequel.

The federal sector complaint process is a disaster which everybody, and I mean everybody, agrees must be fixed. After six years of formal and informal consultation with Congress and other agencies, and countless hours of staff work. The Commission issued, or tried to issue, a notice of proposed rulemaking. It came up for a vote and was voted down. Now, you all know that's very unusual for a notice of proposed

rulemaking to be voted down at that stage. I believe—I know—that the major reason was disquiet on the part of my colleagues with the process of rulemaking, with the prospect of taking another flogging from the interests and with the prospect of taking another flogging from Congress. According to the Administrative Procedure Act, this was the appropriate time for public comment, to get the input which would provide the basis for changes. But this time the civil rights lobby was concerned that the NPRM had set the agenda without prior discussions with them and that that would dictate a final rule not to their liking. They misread the Commission. They doubted our open-mindedness, and they were able to prevent the agency from acting and thus, the public from even commenting. In effect, they preempted the delegated function of rulemaking.

Now, when I first got to the EEOC, I was puzzled by what seemed to me to be the rather fuzzy nature of policy formulation and promulgation. I believed then, and I still believe, that the rulemaking process produces credible, predictable and accountable policy. Congress intended that policy be made in the open; it's more democratic, it's more desirable. I've learned, however, that the more overt the policymaking, the more endangered the agency's independence. Better to make policy through adjudication and prosecution. It's safer because it's incremental and you present a moving target. You can be a lot more independent but that independence is achieved with timidity, which is really no independence at all. Abstract questions of desirable governmental organization and procedures are overwhelmed by political realities.

SALLY KATZEN: Thank you very much. Our last speaker is Professor Peter Strauss of Columbia Law School. Professor Strauss did his undergraduate work at Harvard and his graduate work at Yale. He clerked for Judge David Bazelon on the U.S. Court of Appeals for the D.C. Circuit and then for Justice Brennan. From 1968 to 1971, he served as an assistant Solicitor General; he then joined the Columbia Law faculty from which he took a leave of absence from 1975 to 1977 to serve as the General Counsel of the Nuclear Regulatory Commission. See—we're touching all the bases now. He has been an active member of the Administrative Conference of the United States, an acting and contributing member of the Administrative Law Section before it changed its name to Section of Administrative Law and Regulatory Practice, and has written extensively in the field of administrative law, specifically in the area of separation of powers. We welcome Professor Strauss as he brings today his thoughts in closing.

PETER STRAUSS: Thank you, Sally. I will try to keep them short, as the afternoon is getting late and I imagine you want some time for questions and discussion—and that would be my favorite setting in any event.

Yes, I was associated with the villainous NRC, even back in the good

old days of the Ford and then Carter administration when the Sea-brook disaster was being put on the road. And it was there that I got my first taste of the complexities of this problem.

The NRC is a wonderful administrative agency from the advantage of which to ask this question, because, among the other things it does, it licenses exports of bomb material to foreign nations. Now it's not bomb material when we send it out, but it might become bomb material, nuclear bomb material, and that gives rise to a certain amount of concern. Congress, in its wisdom, put this function in an independent regulatory commission and told this independent regulatory commission that it was to make the assessment whether national security permitted or didn't permit sending this stuff off to, say, India. To do this we had to have our own miniature CIA, we had our own little State Department. We had some wonderful set-tos with the Department of State; they thought they were in charge of foreign affairs matters at the time. The conflicts and duplications of effort gave one pause over the wisdom of the independent regulatory commission device.

My favorite event was when a bill was proposed to domesticate the use of executive privilege. It wasn't too long after President Nixon's resignation, and there was a certain amount of concern over executive privilege, a reluctant willingness on the part of Congress to admit that privilege could ever be claimed, but really quite reluctant. The idea was to send up a bill that would require the President himself to sign off before executive privilege could be claimed. We were, despite our "independence," in the OMB loop to receive such proposed legislation and, for some reason or other, my commissioners actually thought they ought to wait to see what OMB said before they took certain kinds of actions. So we got the bill. It said nothing about independent regulatory commissions being able to claim executive privilege. So, on behalf of the agency, I sent a letter back to OMB—or perhaps it was to the Department of Justice—saying, fellows, we hold in our safes nuclear bomb plans, all kinds of sensitive data that we get from the Department of State because they feel they have to persuade us whether to send nuclear fuel to India or not, so forth and so on. We ought to be able to claim executive privilege. And we got a letter back from the Department of Justice declining to take that position. You are an independent regulatory commission, it said, and you can't have executive privilege. At which point the question put for today's discussion came really quite sharp and clear: independent of whom?

As I suppose you may know from my writings (I think it sufficient for these purposes to send you to them because time is short) my own answer to that question is, independent of no one. I feel rather vindicated by the Supreme Court's outcome in *Morrison v. Olsen* last spring. I think they took just the right path. It is a path that says, in effect, that separation of powers questions are questions of relationship more

than they are questions of placement. It doesn't particularly matter where you place or what you call an organization. The issue is whether it is close enough to the President for one to believe that the President is still in charge; close enough to the Congress for one to believe that, so far as the Congress acts, that the Congress is still in charge; and, for that matter, although the courts have been chary about saying it, close enough to the courts. I think that legal analytic framework at last is on a fairly good footing.

I find none of what we have learned from the previous speakers very surprising. I don't imagine many of you find it surprising, either, although you may have noticed, as I did, a curious modesty on the part of some. Invited here to speak to the question "Independent of Whom?," the representative from the Congress was heard to say "Well, certainly not of the President!" and the representative of the President was heard to say "Well, certainly not of the Congress!" and neither of them spoke at all about their own branches' relations, as it were, which one has then heard from our last two speakers are indeed significant. Perhaps you may say, control is especially aggressive on the congressional side—that certainly does seem to be the burden of the comments we've heard. But then as Jim Miller was, I think, candid enough to remark, after all, the President had appointed him; he likely knew what he was getting, and there are, as well, a lot of other important levers in the presidential hands.

It hasn't always been quite this way. Sally's opening remarks on the influence of politics on this question brings me to say the following: In my judgment, the issue of independence is going to seem a lot less important if the Congress and the President share political allegiance than it will if they continue to be divided. That is to say, one of the factors that has made this question so important over the past couple of decades is that we've had predominantly a Congress dominated by the Democrats and a White House dominated by Republicans, and this has given rise to a good deal of tension, of infighting over who's in control and of what. More than good administration, in the abstract, is at stake. In this respect, one of my favorite anecdotes concerns the reaction of the Federal Trade Commission and Congress to the original decision in *Humphrey's Executor*. Franklin Roosevelt was certainly assured that he would soon control the membership of the commissions, but if you remember *Humphrey's Executor*, he wanted to get a fast start toward getting a Democratic FTC, so he had invited Chairman Humphrey to leave, which he refused to do. Shortly after the decision in that case, the Commission sent its budget directly to the Congress saying, since we're an independent regulatory commission, we don't have to cooperate with the President's budget bureau. They thus denied being part of the process that Joe Grundfest rightly reminded us is a process for setting national priorities, in which one would think that all organs of government played some role. Congress

refused to stand for this. The act was promptly amended in 1939, specifically to include any independent regulatory commission or board among the agencies that were subject to the budget bureau's oversight. And Representative Warren, a good Democrat I'm sure and a member of the Select Committee on Governmental Organizations, explained this measure to the House in the following words:

With respect to Title II of the Bill under the decision in the *Humphrey* case, we have something new to appear down here in respect to some of these agencies. They shrugged their shoulders and said, "we're not under any budgetary control," quoting that case. Now all that Title II does is to bring every single solitary one of them under budget control, and I believe everybody in this House favors that.

That was, of course, a Democratic Congressman and a Democratic administration making a good deal of administrative sense. One wouldn't necessarily expect similar sentiments in a Democratic Congress under a Republican presidency. Indeed, it strikes me that those were not the kinds of sentiments we have heard today.

There are other ways in which this problem is an artifact of larger politics. Taking the same point a little bit further, the fact of divided political control seems to me to be part of the decision not to have a parliamentary democracy here, not to join legislature and executive. The struggle is over who is in charge to an extent that simply wouldn't arise in Great Britain or France or Italy or any country that didn't observe our peculiar political structure. There may be reasons for wishing independence of politics in some agencies some of the time. I think we heard those in Jim Miller's reference to the difference between adjudication and other functions, a difference that he said (and it's my observation too) is rather easily sold to members of Congress and to the White House both. Those may be reasons for wishing independence of politics but they're rather separate from the problems that arise in connection with policymaking—rulemaking.

One other thing and then I'll stop. I think in some respects what we're seeing is one outcropping of a general problem facing government in the United States at the end of the twentieth century which is—and the literature is showing up in a lot of talk, some of it more theoretical than others—about the problem of the administrative state, or, as I would put it, the problem of size—the size of the government effort and the changes that have accompanied that. Look, for example, at the way in which statutes now appear. Congress in 1893 passed a statute about safety in railroad cars. In 1966 it passed a statute about safety in automobile cars. The same problem; thousands of people dying and being injured, property damage and the like; the same kind of response; we have to be sure we'll get a safer vehicle out of this. But in 1893, what Congress did was to say you have to have automatic couplers, you have to have grab bars, you have to have power brakes, the drawbars between the cars have got to meet each other. They

actually solved the problems with which they were confronted. If you go and read the debates you'll find that the Senators are actually talking to one another about the technical questions and policy issues raised.

In 1966 what the Congress said was: CARS! ACCIDENTS! SAFETY! FIX IT!, and appointed the National Highway Safety Transportation Traffic Administration to do that. It's reflective of the general shift in statute-making from what one scholar calls transitive statutes, statutes that have an object, to intransitive statutes, those that merely set up a process. Once you set up a process, you then have enormous issues of control. Here's this process. How do we know whether it's producing something that we like or not? And one sees another transformation. Again, at the congressional level in 1947, the total committee staff of the Congress was 399. In 1982 there were almost as many committees as that—298—and there were 3,278 professional members of staff. As recently as 1965, members of Congress were spending on the average one day a week in legislative research and reading. That figure dropped within a decade to an hour a week in legislative research and reading. They, too, are spending all of their time in control. A fragmentation of effort from legislation to oversight, from direct participation to an effort to control burgeoning staff, burgeoning problems.

In many respects what we've heard today is a reflection of that change—a change that we have not directly confronted or decided how to respond to most appropriately. Clearly, at least in a theoretical light, we must do so. Nor do these problems concern only the Congress. One could make remarks equally on the growth in staff in the Office of Management and Budget, on the change in the analytic processes and oversight techniques of the executive branch. When we first undertook environmental impact statements, we thought they made a lot of sense. Economic impact analysis—yes, we can understand that too. Since then we have developed regulatory flexibility analysis, and then family impact analysis and federalism impact analysis—at some point an impact analysis is called for! Again I submit to you that what we are facing is a sea change from using the major institutions of our government (President and Congress) in attempting directly to solve public problems, to using them in an effort to control other inferior institutions that we rely on to solve our problems. A proliferation of distractions from the business of resolving the issues of government that presents us with a major crisis.

SALLY KATZEN: Thank you, Peter. You have all been very patient. You have heard now various different viewpoints. It is your turn. Either make your own comments, observations, or raise any questions you have. Comments please. Bill [Funk].

QUESTION: I worked for five years for the Department of Energy, a cabinet department. It is interesting to hear various statements from the independent regulatory people, independence from staff. Same question. Are people from the old AEC hanging around various

administrations, still doing the same thing, still carrying out their role, who cares if it is the dentist or the former head of Coca-Cola that is the head of the agency, we keep doing our thing. Same issues in the cabinet department: private interest; special interest groups; the same thing. Boy, I can think of the regulations that we didn't do because the private interest got in there and stopped us first. There were some differences because sometimes the executive came to our assistance. On the other hand sometimes it was the executive who came and said that the private interest group said to do this, do it. So it works both ways. So I keep coming back to the question, what is the difference between the independent agency and the executive department? I thought that Peter's comment at the very end of his statement was that all the things we are talking about really don't have anything to do with independent versus nonindependent agencies, they have to do with other aspects of governing the administrative state. So I have always wondered about what is it that makes these agencies special, and I always focus on the fact that there are more of you in the decisionmaking process. In other words, you have a multimember group that has to reach a decision by some sort of committee consensus thing rather than a strictly hierarchical one man at the top/one woman at the top who makes the decision. And when I look at the decisionmaking processes, I see more difference between the systems in that aspect rather than any other. I ask for your comments.

R. GAULL SILBERMAN: Well, I would start by saying not always. The decisions are not always made. After all, we have executive branch agencies that have, as we do, multimember groups, and we have single-headed executive branch agencies that assert great independence at times. I don't think it makes a great deal of difference. I agree with you about the same pressures, the same influences, and that's why I put my remarks in terms of who influences, and when, and what difference it makes. I don't think it makes a great deal of difference. If it does make a difference, from my experience, the difference is that the Congress is much more responsive and much more effective in influencing than the executive branch is. Now that may just be another aspect of a weakened executive.

QUESTION: I forgot to mention Congress, because when Mr. Grundfest held his things from Congress, I was thinking—boy, are you lucky! That's one letter from John Dingell in one week that we would get.

PETER STRAUSS: There is a certain tattoo of commentary from people who have been on independent regulatory commissions; and Jim Miller said something like that to Cal Collier when he was Chairman of the FTC. He said the difference in being in an independent regulatory commission is that you have a 535-person board of directors and you are, in effect, naked before the Congress. I think what Jim said is that you haven't got the protective shelter that the presidency



can sometimes offer. But in terms of what is done, how it is done, and what kind of pressures are you subject to, who communicates, what is the problem, all that you have mentioned, no.

JOSEPH GRUNDFEST: I think another observation is in order. Whether you look at the government or the private sector, students of organization observe that you can't tell very much from the official organization chart. I think that really is right. Much more depends on the nature of the individuals involved, on specific relationships at individual agencies, on relationships with the Hill, and on relations with the administration, than on an organization chart. We have a President now who is well known for not liking to replace people for a wide variety of reasons. In contrast, if you had a more Carteresque style of management, involving stronger micromanagement and the like, I can imagine a situation where, because it is easier for the president at least in theory, and I also think in practice, to micromanage at an executive branch agency than it is to reach out to an independent agency, then it might actually make more of a difference. But if the administration style is not oriented toward micromanagement and if it relies heavily on delegation, it can be an excellent style, then there may not be much of a difference.

SALLY KATZEN: Jim. [James T. O'Reilly]

QUESTION: My committee is struggling with an issue in which an independent regulatory agency may have a different point of view than some of the cabinet agencies which are promoting a particular product. My question is, what is the balance of respect during a rulemaking by either the independent agency for comments received from the executive branch, or in a rulemaking by the executive branch agency for comments received from the independent agency? How much respect do you give each other and who should act as the, if you want to call it, the honest broker? Should there be an OMB role for that, should the President become involved in some way if there is a disagreement on a rulemaking policy question involving either the independent agency which is at loggerheads with the executive branch, or conversely the executive branch agency receiving strong disagreement from an independent agency?

PETER STRAUSS: Let me respond to that, as I am not in the current political setting. I don't think there is a formulaic answer to that. At the NRC we had a lot of dealings with EPA. There is a regular process for developing treaties between governmental agencies, a semi-public process that we went through in attempting to develop memoranda of understanding. You would go to OMB, which might be capable of acting as an honest broker. They had somewhat less capacity to twist our arm than they would have to twist the arm of, say, the Department of the Interior. On the other hand, we knew that our budget estimates were going to be going through them and we wanted senior executive service grades or whatever other goodies they could give us. So it wasn't

as if the difference was black and white. It seems to me that on this issue, as with a number of others, a good part of the problem lies in what I was suggesting in my questions to Jim before, which can only be described as political cowardice on the part of the White House. Maybe, you will think, well-advised political cowardice; that is to say, that they shouldn't want to get into that kind of fight with the Congress. Nonetheless, from a constitutional prospective, it is clearly the President's function to coordinate issues of that character, and I would say just as clearly from a legal perspective, he has got the authority to do so. The Constitution says that he may demand the opinion in writing from the head of any executive department on any matter within the responsibility of that department, and I cannot imagine any other conclusion than that statement includes the SEC; and for that matter, if the Chairman of the SEC were to thumb his nose at a presidential request for such information and the President said "Go packing," the Supreme Court that wrote *Morrison* and that wrote about dismissal for cause in *Bowsher v. Synar* would say that that's cause, and the Chairman was properly dismissed.

QUESTION: Could I ask if any of the commissioners have a point of view?

R. GAULL SILBERMAN: Well, my answer to that is that I think it depends on the issue. Are you really talking about a political decision on the part of OMB or the White House, and depending upon how much pressure is being exerted on both from those interest groups, from the staff. And I think there are some issues that you would get a very courageous White House on, and there are some issues that you would get a White House that says, "Hey, who cares, you guys take care of it all by yourselves." We are involved in such an issue right now. The IRS has spoken and we know that neither OMB nor the White House will support us, so we are going to go ahead and make our regulations comport with the IRS regulations.

JOSEPH GRUNDFEST: I think, to a certain extent, it is always true that when you get written comments in a rulemaking, you look at the source of the comment and you weigh that in conjunction with the substance of the comment. Very often you get comments from American Bar Association committees, and that does carry, believe it or not—it may come as a surprise to some of you—a certain amount of weight as coming from a group relatively expert in the area. I see a lot of heads shaking at this point.

QUESTION: Are you a member of the ABA?

JOSEPH GRUNDFEST: I certainly am. I am a card-carrying member of the ABA, but I am not running for President this year.

R. GAULL SILBERMAN: In some circles that could get you in a lot of trouble.

JOSEPH GRUNDFEST: That's exactly right. Maybe next time I run, I will have to disavow my membership. Can I have a copy of the tape?

The only copy? I will burn it or maybe we can insert an eighteen-minute gap. These gaps are not unusual. Actually, I think that every agency does, to some extent, consider the source of the comments in conjunction with the substance of the comment. When you get a comment from a sister agency, or from Capitol Hill, or from the administration, you do pay special attention and think, "What's the reason for this comment; is there any unstated rationale, is there any other agenda at work?" You do want to take that information and put it together with everything else.

REINIER LOCK: I am a legal adviser to one of the commissioners at the FERC. We have heard a lot about the tremendous influence from Capitol Hill on the regulatory agencies. I think I am going to swim against the tide a little bit and suggest that that has been exaggerated this afternoon. Maybe this is just the experience of one agency, and this may seem an odd time for me to say this, having just come through an eighteen-month battle—with being involved reluctantly in an eighteen-month battle—to get my own Commissioner reappointed, and certainly when five appointments are on the line, Capitol Hill has an influence. But I think that that tends to be an exception. My sense is that oversight hearings and the sorts of inquiries we get from Congress have not been unduly influential. Yes, certainly, like other agencies we tend to get the calls about individual Senators trying to get a hydro application license or a cogeneration facility license. Again, I think the threat of oversight hearings has not been massive. My own Commissioner's remark is a good one. I think he said that threatening a commissioner with an oversight hearing on the Hill is like threatening to throw water on a duck.

I think one thing that has been overlooked in terms of influence of the executive, and I think it is a very positive influence, has been the intervenor role of agencies like the Department of Energy and the Department of Justice—certainly, in the informal rulemaking, and occasionally in the adjudicatory cases as well. To my mind, that has done far more to fashion major rulemaking initiatives such as those in the natural gas area than has the influence from the White House, or OMB, or from Capitol Hill. I think there is one important missing ingredient. The only point—which I would like to make is one of the real problems, and maybe the real question for an agency like FERC is how to effectively interact with other agencies, both in the federal government and at the state level and even now I think with the National Energy Board of Canada as we move towards a sort of meshing, if not overlapping of jurisdictions and meshing of jurisdictions. It is apparently very difficult for FERC and the SEC to talk to each other meaningfully about matters such as FASB 92. It is extremely difficult for FERC to talk to the FTC about major mergers in the natural gas area. To me that is one of the most difficult and unexplored areas every time. An example, the FTC staff came and tried to involve my Commissioner in an

investigation of a merger and my general counsel's office basically prevailed upon us to get out of it. It just got too messy for a sitting commissioner to do that. I would be interested if any of the panelists have any comments on that difficult question of effective interaction between the federal agencies.

JOSEPH GRUNDFEST: We have a specific problem at the SEC. People have said that the crash was either caused or exacerbated by the lack of coordination between the SEC and CFTC and you should solve that problem by not having two separate agencies. In that particular case, I have not had that much of a problem. I have good personal relations with the members of the CFTC. I know the staffers over there, and when an issue comes up, I haven't perceived any difficulty in their picking up the phone, giving me a call, complying with all regulations, and putting the appropriate stuff in the public file if it is necessary.

R. GAULL SILBERMAN: Well, I think it gets back to Peter's functional analysis: There are certain things you need coordination on and you need a way to do just that. It is not a problem that we run into very often.

PETER STRAUSS: There is one possible complicating factor if what one is talking about is not commissioner-to-commissioner contact, but commission-to-commission contact and that through the Government in the Sunshine Act, which is just another example of the ways in which, by taking up space in the 24-hour day, oversight techniques have managed to reduce the amount of energy that is available for administration.

R. GAULL SILBERMAN: I would like to go back to your comment about oversight and the duck to water. It seems to me that that makes our point. The reason it is like a duck to water is that they are so used to it.

QUESTION: It started in the fifties when what used to be collegial independent agencies became agencies where the head of the agency was appointed by the President as a permanent position, an observation, and I would like yours, that has significantly changed the relationships between the Congress and the executive branch and the independent regulatory agencies. The Interstate Commerce Commission with eleven Commissioners used to have as its chairman each year the most senior member who had not been chairman before, and no decision was made except collegially, and staff was hired collegially so that a presidential appointment did not only select ideologies, if that happens to be the word of the day, to fill the agency to carry out its new mandate as seen by the head of that independent agency. And secondly, the last letter I got from AARP said, "on behalf of our 21 million members, . . ." and I don't just think that is a small interest group whose views should not be seriously considered and in the issue you raise in the labor-protective field with which I happen to be fa-

miliar, it has been almost academic that no worker is ever permitted to make a decision on a lump sum payment on anything—whether workmen's compensation, or retirement or any of those decisions without having a tribunal review it, and at the Department of Labor, we're forced to do so in an open record for the hearing.

R. GAULL SILBERMAN: Under the FLSA that is true, but it's not true in terms of general labor and employment discrimination law. It is certainly not true under Title VII. The purpose of the FLSA is very, very different. Our case is really like a person settling a claim with an insurance company. You are talking about a claim, an asserted claim.

QUESTION: My only purpose in raising that was that it didn't surprise me that the AARP would take a position and, given its size, would have more than reasonable support in an area to make a case that would be very significant, whether on the Hill or in the executive. I mean, I am surprised that you were surprised.

R. GAULL SILBERMAN: It did not surprise us either, and it seems to me that that influence was perfectly legitimate. Whether or not it was good in terms of policymaking is a different question. But it was certainly legitimate. If I left the impression that it was less than legitimate, that was unintended. Nor did I say it was a small group.

QUESTION: Could I get the comments, though, on my first observation. I am interested particularly, Peter, in your view because you have watched this over, what, 30 years.

PETER STRAUSS: I don't know if it has been that long. It feels that long, on occasion. I think you are right that there has been in recent years something of a tendency to identify the chair of an independent regulatory commission as a person distinct from the remainder of the commission and having much more authority over day-to-day management of the commission, including staffing decisions. Sometimes that can be more of a legal than a practical political matter if you are on a small body of, let's say, five highly egotistical individuals, each of whom who thinks that they are contributing significantly to the public good, and your position as their leader is to say consistently to them, "I know you are interested in who the General Counsel is, but that is my decision," "I know you are interested in who the staff director is, but that is my decision." You may find that after a while you don't do so well in the matters on which they are entitled to sit. My own judgment is that this appropriately reflects a kind of connection to the President that is, in fact, necessary and called for in the curious structure of government that we have. The President is entitled to a person, as it were, on the commission and the person who is most in charge of, if you like, the executive affairs of that commission. It has the tendency to turn his fellow commissioners or her fellow commissioners into judges/senators who sit to decide cases and enact rules but do not run the day-to-day work of the agency. Well, that's a model I could live with. But I think you are right, the change has occurred.

SALLY KATZEN: Paul [Verkuil]

QUESTION: It seems to me that the following proposition is true. Let's see. All commissions are not independent agencies. On the other hand, all independent agencies are commissions. Now that leads you to ask the question, and this is what Bill Funk asked at the outset—does it make a difference in terms of independence whether you are talking about a commission or a single-headed organization, and that also brings in the chairman question. It seems to me originally that when independent agencies primarily adjudicated, it made sense that they should be commissions because they were supposed to be like courts, like this court here, an Article I tribunal. And you wanted group decisionmaking, you wanted consensus, you wanted to have a little discussion, you know, and the ideal like we have appellate panels, and that made a lot of sense. Then when the commissions started doing things like policymaking and rulemaking and other things, it got very cumbersome. Indeed, I think that is one of the reasons why the chairman has been given more power—because it makes sense to have someone running the show when you have got all of these commissions (and maybe you can help on that because you are commissioners), you need someone to make these decisions. And it would be nice especially from the executive's point of view if you could call up an individual and say "Look, how about let's get this through, we need some work." I think that makes sense.

Now the question becomes, if that makes sense, wouldn't it make more sense to eliminate commissions altogether, at least with respect to the nonadjudicative function, and just to have single-headed independent agencies for purposes of making many of these decisions? Interestingly, the legislature, I guess the investigation about the NRC's ineffectiveness, has come down to recommendations that say it shouldn't be a commission. The reason why, and I think this Rogoven and even maybe the Cammady Commissions both said that, the problem is that you don't have any decisive decisionmaking. You have got safety problems. You have these five commissioners, and they are all passing the buck. No one wants to do anything. They are all afraid of getting beat over the head by Congress, so as a result, nothing happens. So you just need a single czar—the old notion that someone can run the commission. Even Congress, which I assume, created a commission because it sort of diffuses powers and gives them more influence and it firms up the terms for people, seems to be receptive to a reorganization of the NRC along these lines. Does it make sense in the policy area, I guess, to have commissions, or wouldn't we be more effective if we had single-headed agencies?

R. GAULL SILBERMAN: I think it makes sense. I think your idea makes sense. I did when I read the paper, which, by the way, is coming out in the *Duke Law Journal*, and you all should look for the *Duke Law Journal* issue on this subject. But I don't think it is going to happen.

The fact that Congress says it is fine for the NRC I think may be a relatively special circumstance. When you create an agency with a single head in order to have more efficient (and that is what you are really talking about) policymaking, then, it seems to me that you are inevitably and ineluctably taking power away from Congress and giving it to the executive, and I just don't see that as very likely.

JOSEPH GRUNDFEST: I also think that it is very hard to generalize in that situation. We at the SEC right now, for example, are involved in a rulemaking process where we are trying to craft a notice for proposed rulemaking. From my perspective at least, our result is going to be far better because we are going to have a result of consensus, compromise, and hard work involving Ed Fleischman, Dave Rudder and Charles Cox. I might even contribute my two cents worth. I think the net result of the four of us trying to push together in the same direction, bringing different perspectives, different concerns, different articulation of legal principles and the like, will lead to a richer document, particularly in the proposing stages. As a result, the release is likely to stimulate better comments, better responses and will, I hope, lead to a better final rule down the road, if there is going to be a rule rather than the situation that would result if any one of us were to write the release on his own. I alone could not achieve the result that will come as a result of the cooperation among the four of us. Ed couldn't do it alone, Dave couldn't do it alone, and Charles couldn't do it alone. That is an example of how collegiality, when properly applied, can be beneficial in the rulemaking process. Granted, it doesn't always work that way.

PETER STRAUSS: I agree with that. This issue of shifting from multi-headed to single-headed organizations has arisen any number of times—well, at least two—the Ash Commission was the most recent proposal. And no one has ever been able to demonstrate that, in fact, single-member bodies are more proficient in developing regulations or effecting policies or securing public ends than multi-member commissions or vice versa. It seems to me that one of the ghosts that stalks this particular issue, one Congressman Markey came closest to mentioning, is the ghost of personnel. Who is going to do it? Give me the right single commissioner, okay, maybe. But it is also easier to get a single commissioner resembling one of the several members of staff whom I observed when I was general counsel of the NRC. The staff problems that Joe Grundfest had were very much in evidence then and it was clear that one of the major problems was getting controversy past the people who thought they were czars over a particular area. Put a single commissioner in place who is going to be a czar in that area and you don't learn things that you might learn—in that commission, perhaps, in particular.

Let us also go back to the proposition that it had so much to do. The original Nuclear Regulatory Commission had among its five members

a lawyer with a great deal of regulatory experience in the course of his career, a lot of it at the AEC but not all of it at the AEC; a chemical engineer; a former colonel of the Army who had spent a lot of time in the country's intelligence and security apparatus; a physicist who had spent a lot of time at the Rand Corporation doing systems studies of various sorts; and a former astronaut with major management and leadership skills. You couldn't have found those qualities in one person. When they weren't arguing about what the insignia of the Nuclear Regulatory Commission should be (because egos do get in the way) and were instead addressing themselves to serious subjects, as Commissioner Grundfest suggests, they produced a work product that was considerably enriched as compared with a single head.

R. GAULL SILBERMAN: You are talking about economic tradeoffs, tradeoffs between efficiency and coordination.

PETER STRAUSS: You substitute five political bazookas for those five people, and you are in a lot of trouble.

JOSEPH GRUNDFEST: The point about the staff—the SEC, for reasons that I don't understand, has the most amazing staff imaginable. You could take—and we are not about to do this, so don't get any ideas—you could take the staff of the SEC, and if we left the government and opened up our own shop, I think we would have one of the top ten law firms in the country on day one. We have got people in that building that we know can leave today and go to New York. At a minimum, if they take the low bid they would get ten times the salary that they are making at the Commission today. The point that I made about the staff tending to be more sensitive to Congress is not a criticism of the staff at all. It is a reality that the staff tends to deal solely with Congress. You do not get the administration calling our Division of Investment Management or Market Regulation or the Division of Enforcement or Corporation Finance. The only action response function, as a practical matter, is programmed from Capitol Hill, and over time I think that has a cumulative effect. I do not mean to denigrate in the least a staff that is so good that I find hard to believe that it is there, but I just mean to point out that in terms of an institutional Pavlovian response, the stimulus at the staff always comes from the Hill, and as far as I can tell, virtually never from the administration.

QUESTION: But isn't there an iron triangle problem? I certainly heard the kinds of thing that Bill Funk says he heard at the Energy Department, at the NRC, that civil service bureaucrats—maybe you are lucky at the SEC and just don't have any—are there for the long term and over time, they develop relationships with Congress that they know how to work.

JOSEPH GRUNDFEST: We certainly have some of that, but by the same token, we have some of the most absolutely amazing independent-minded individuals who will go up to Capitol Hill and will look Mr. Markey and Mr. Dingell in the eye and say, "Gentlemen, with all



due respect, you are very wrong, and here is the reason why.”

SALLY KATZEN: We have time for two very short questions. Charlie [Ablard] was standing and Arthur [Bonfield] had his hand up. So, if we can have your quick questions, please.

QUESTION: Aside from the various talents that you have so eloquently spoken about on the different commissions, it strikes me, first of all, that this country has never been terribly fond of czars. The other point that hasn't been discussed, and I wonder whether any of the members of the panels see any particular merit, or is it just irrelevant, is the bipartisanship of the various commissions and the fact that they are required to have a bipartisan complexion. Does this hurt, help, or is it neutral?

PETER STRAUSS: I think it damps policy swings somewhat, as someone points out, two or three years into an administration and you probably can't tell the difference any more.

R. GAULL SILBERMAN: I would disagree with that. I don't think that any of us are saying that commissions always make good decisions.

PETER STRAUSS: And they don't always make worst decisions.

R. GAULL SILBERMAN: And they don't always make the worst decisions. That's right. As far as the bipartisanship is concerned, Charlie, in my experience, even after eight years (we now have a Reagan-appointed bipartisan commission), those Reagan Democrats are still Democrats, and they still have certain policy differences with some of the Reagan Republicans. I think that is probably all to the good, particularly in an area like ours that is involved in rights.

SALLY KATZEN: Arthur, last question.

QUESTION: This Section of the ABA, as well as on record, is favoring as a general proposition a better means of policy formulation, and we have a long history supporting that. I was fascinated by your comments, Commissioner Silberman, with respect to what happened when members of your commission, from your perception, were beat up in the political process, causing them to prefer ad hoc adjudication incrementalism, which is a general proposition again. I think it is a poor way of making policy for a whole bunch of reasons. And my question, I guess, is since you have been at the vortex of this and have suffered from it, how can we handle the problem of inducing more rulemaking, but at the same time keep the agencies responsible? We can't isolate the agencies, after all, from that political pressure, because that is a legitimate and important part of keeping them responsive, which point I was making with Miller with respect to Nino Scalia's position. How can we do that and at the same time keep agencies from preferring adjudication where there isn't as much opportunity for broad public input, and which, as a general proposition, is not a good way of policymaking.

R. GAULL SILBERMAN: Well, let me start by saying I don't think that you really can keep agencies from preferring adjudication. I think

that is just human nature; it is easier. I have done a lot of thinking about the rulemaking that I spoke of, which was born in my office, and what has happened with that rulemaking, may answer your question. That was an incident where you had a very vocal and seemingly very large interest group that had a very particular point of view and made that point of view known and was quite effective. There was no countervailing interest that was voiced because, frankly, although the gentleman is surprised that I was surprised, everyone was surprised that the AARP came up with this point of view. This was a point of law that seemed to be accepted across-the-board. We were merely codifying the Sixth Circuit court's opinion on this issue. So what happened when the suspension of the rule through the appropriations process came up, some of the companies and some of the people who had gotten these very enhanced early retirement benefits, got quite upset at the fact that not only was our rulemaking being stopped, but the policy was going to be implemented in terms of an appropriations rider. And right now a big battle is going on on the Hill, and that is where it should be going on. If that battle is won by the people who think the rule is a good idea, we might be more likely in the future to engage in rulemaking on controversial subjects. I don't know. Democracy is, after all, messy. And rulemaking is one of the ways you administrative lawyers and judges have figured out you can make it a little better, a little bit easier, and use the experts. All I am telling you is that it doesn't always work, but I think that every time that it does work, we all are a little bit better off.

QUESTION: The troublesome thing about it though, of course, as you point out, it works which means to some extent that the political process does get levied in, it discourages the agency from doing it again.

R. GAULL SILBERMAN: No, I don't think so. No, I didn't mean to say that. Listen, this is very political. I am a political appointee. We are talking about politics in the best sense of the word, as long as everybody gets into the mix. But this was done at midnight and in the appropriations process. There were no hearings, there were none of the things that are important for rulemaking. I think as long as it's done in the open and everybody gets in there (and if they care about it, they get in, and if they don't, fine), that's okay. I am there to do what I think is right and to reflect what I think is the political consensus. But I have to hear what comes into that consensus, and what happened in both of those instances I mentioned was that the information was cut off from me, and I think that's wrong.

QUESTION: But the danger from my point of view, and I won't say another word, is that because the rulemaking process appropriately invites the political process in, agencies become chary of using rulemaking and they adjudicate, they make policy by adjudication.

R. GAULL SILBERMAN: I can't agree with you more. I have spent

four years fighting it, and I hope to go and fight the good fight for a little bit longer, but I just wanted all of you to be aware of some of the problems that come up.

SALLY KATZEN: It is very unusual when Arthur does not get the last word. I want to compliment Vice Chairman Silberman for bringing that about. I would like to compliment all of our panelists for being such superb participants and providing thoughtful commentary on a difficult question.